

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-0761

Reversed
No Disqualification

PROCEDURAL HISTORY: On February 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 143440). Claimant filed a timely request for hearing. On April 9, 2014, ALJ Vincent conducted a hearing, and on April 16, 2014 issued Hearing Decision 14-UI-15301, affirming the Department's decision. On May 6, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

Claimant failed to certify that she provided a copy of her written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). Therefore, we did not consider claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Pathway Enterprises, Inc. employed claimant from November 7, 2007 to January 30, 2014, last a house manager.

(2) As of January 1, 2009, the employer's operations manual stated that all on-site medications must be stored and secured in a locked space or container, and that no outdated drugs were allowed to be kept on-site. The manual further stated that the house manager was responsible for ensuring that all medications were stored in a locked storage space, reviewing all stored medications on a monthly basis, and removing outdated medications. The manual further stated that the house manager or designated supervisor would arrange to dispose of non-controlled medications with a second staff member to witness the disposal, and that the house manager and a second staff member would dispose of all controlled substances.

(3) Claimant was familiar with the employer's operations manual. Claimant assigned the assistant manager the task of disposing outdated non-controlled medications with a second staff member to

witness the disposal. On the rare occasions when controlled substances became outdated, claimant and a second staff member disposed of them.

(4) In mid-December 2013, a staff member gave claimant outdated controlled and non-controlled medications for disposal. The assistant manager was off work that day, so claimant placed the medications in an unlocked file cabinet in her office. Claimant's office remained locked unless claimant or the assistant manager was in the office. Claimant intended to dispose of the medications when the assistant manager returned to work.

(5) Claimant forgot that she had stored the medications in the file cabinet, and therefore did not dispose of them when the assistant manager returned to work. On January 23, 2014, the house supervisor found the medications, and informed the employer's residential director. Upon further investigation, the employer also discovered another 38 outdated medications in a locked storage closet.

(6) The employer discharged claimant for violating its medication storage and disposal policies and procedures.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer failed to establish claimant's discharge was for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Good faith errors are not misconduct. OAR 471-030-0038(3)(b).

In Hearing Decision 14-UI-15301, the ALJ concluded that claimant willfully violated the employer's expectation that she store medications in a locked storage space by consciously storing medications in an unlocked file cabinet in her office, and a storage closet.¹ At hearing, however, claimant testified that she believed storing medications in her office complied with the employer's expectations because her office remained locked unless she or the assistant manager was in the office, and was as secure as the employer's medication closet. Transcript at 20-21. The employer failed to show by a preponderance of evidence that claimant knew or should have known that storing medications in her office probably violated the employer's expectations, and that her conduct was not the result of a good faith error in her understanding of those expectations. Absent such a showing, the employer failed to establish misconduct.

¹ Hearing Decision 14-UI-15301 at 3.

The ALJ's analysis also overlooks claimant's testimony that she did not store medications in the storage closet, did not know that medications were stored in the closet, and had no reason to suspect that medications were stored there. Transcript at 21-23. Absent a preponderance of evidence that claimant was aware of the medications stored in the closet, the employer again failed to establish misconduct.

The employer also discharged claimant, in part, for violating its medication disposal policies and procedures. However, absent a preponderance of evidence that claimant was aware of the medications stored in the closet, we cannot find that her failure to dispose of them was misconduct. With respect to the medications claimant stored in her office, claimant testified that she forgot she had stored them there, and therefore did not dispose of them when the assistant manager returned to work. Transcript at 20-21. The employer failed to show by a preponderance of evidence that claimant consciously neglected to dispose of the medications, or that she consciously engaged in other conduct that she knew or should have known would probably result in her failure to do so. Absent such a showing, the employer again failed to establish misconduct.

The employer failed to establish claimant's discharge was for misconduct. Claimant is not disqualified from receiving benefits based on her work separation from the employer.

DECISION: Hearing Decision 14-UI-15301 is set aside, as outlined above.

Susan Rossiter and Tony Corcoran;
J. S. Cromwell, not participating.

DATE of Service: June 17, 2014

NOTE: You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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This decision reverses a hearing decision that denied benefits. Please note that payment of any benefits owed may take from several days to two weeks for the Department to complete.